

REC'D COPYRIGHT ROYALTY TRIBUNAL

DATE: FEB 16 1990

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

ORIGINAL

In the Matter of:

1987 CABLE ROYALTY
DISTRIBUTION PROCEEDING

)
) Docket No.
) CRT 89-2-87CD
) Phase II
)
)
)

REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Bernard Korman
ASCAP
One Lincoln Plaza
New York, NY 10023
(212) 870-7510

Of counsel: Bennett M. Lincoff

I. Fred Koenigsberg
White & Case
1155 Avenue of the Americas
New York, NY 10036-2787
(212) 819-8806

Attorneys for
American Society of Composers,
Authors and Publishers

Dated: February 16, 1990

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. BMI UTTERLY FAILS TO DEAL WITH THE ERRORS AND OMISSIONS IN ITS DURATIONAL SURVEY WHICH, WHEN CORRECTED, YIELDS A 65% ASCAP SHARE.....	2
III. BMI'S CRITICISMS OF ASCAP'S FOUR APPROACHES ARE UNFOUNDED.....	7
A. ASCAP's Four Approaches Are Unbiased and Accurate.....	7
B. ASCAP's Use of Nielsen Audience Viewing Data Was Proper and Follows All Prior Precedent.....	14
IV. IF ANY LICENSING MARKETPLACE ANALOGY IS RELEVANT, IT IS THE COMPARATIVE LOCAL TELEVISION LICENSE RATES, WHICH FORM A FLOOR FOR ASCAP'S AWARD.....	16
A. The Distribution Marketplace is Relevant Here.....	16
B. Virtually All Licensing Analogies BMI Presents are Irrevelant.....	17
C. The 1987 Local Television Rates Support ASCAP's Claim.....	22
V. BMI'S PRESENTATION IS NOT CREDIBLE -- IT IS CARELESSLY PREPARED AND MISLEADING.....	26
VI. CONCLUSION.....	27

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

In the Matter of:

1987 CABLE ROYALTY
DISTRIBUTION PROCEEDING

)
)
) Docket No.
) CRT 89-2-87CD
) Phase II
)

REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

1. The American Society of Composers, Authors and Publishers ("ASCAP") hereby submits its Reply Findings of Fact and Conclusions of Law in accordance with the Copyright Royalty Tribunal's Rules, 37 C.F.R. § 301.53, and Order in this proceeding, dated December 5, 1989.

I.

INTRODUCTION

2. ASCAP counsel's opening statement referred to BMI's penchant for throwing dust in the air to confuse or obfuscate. Tr. 460. BMI does just that in its Proposed Findings of Fact and Conclusions of Law, which are heavily laden with misstatements of fact and reliance on irrelevancies.

3. We have already anticipated and dealt with many of BMI's claims in our Proposed Findings. We shall not belabor those points here. Rather, we shall focus on the major misstatements and irrelevancies in BMI's Proposed Findings.

II.

BMI UTTERLY FAILS TO DEAL WITH THE ERRORS AND OMISSIONS IN ITS DURATIONAL SURVEY WHICH, WHEN CORRECTED, YIELDS A 65% ASCAP SHARE

4. As we have noted, the single most important fact in the record is that, when the errors and omissions in BMI's durational survey are corrected, ASCAP's share of performances is 65%. Boyle Rebuttal at 11-12; Tr. 1199-1202; ASCAP Exh. 45R.

5. BMI deals with this fact either by misstating the evidence or by ignoring it totally: For example, BMI says that the Night Tracks cue sheets which it belatedly obtained "refute[] the results of ASCAP's [Night Tracks] tape analysis." BMI Prop. Find. at 67. But BMI has made no such "refutation."

6. The ASCAP tape analysis yielded an ASCAP share of 69% of the Night Tracks music duration. Boyle Rebuttal at 8; Tr. 1191. The cue sheets BMI obtained yield an ASCAP share of 57% of the Night Tracks music duration.

Tr. 1219-1222 (Boyle); BMI Exh. XR3. Either is considerably higher than the 50% ASCAP share Mr. Smith guessed at. Tr. 1054, 1270, 1287-1288.

7. BMI cites Mr. Smith's testimony for the proposition that "inclusion of Night Tracks would have had no impact on the relative durational shares of BMI and ASCAP." BMI Prop. Find. at 67, citing Tr. 1055 (Smith). But the evidence shows otherwise. If the ASCAP tape analysis of the Night Tracks music duration is used, application of BMI's flawed methodology yields a total ASCAP share of 58%; application of the proper methodology yields an ASCAP share of 65%. Boyle Rebuttal at 11-12; Tr. 1199-1202, 1245; ASCAP Exh. 35R. If the BMI Night Tracks cue sheets are used for the relative shares of music duration, application of BMI's flawed methodology yields an ASCAP share of 57%; application of the proper methodology yields an ASCAP share of 64%.^{1/} See Tr. 1245-1246 (Boyle). Thus, inclusion of Night Tracks hardly makes "no impact on the relative durational shares"; a range of 57-65% is far removed from the 50% BMI claims based on its uncorrected durational survey.^{2/} BMI cannot close its eyes and expect

^{1/} The figures are mathematically derived from the record evidence. Those mathematical derivations are attached as Appendix "A."

^{2/} BMI's cue sheets indicate that Night Tracks accounted
(footnote continued)

this evidence to disappear.

8. BMI says that the corrections for the Tom & Jerry program are suspect because BMI has virtually all the music in "Hackle and Jeckle" and "The Little Rascals," two of the program segments used in the Tom & Jerry show. BMI Prop. Find. at 67. They ignore the fact that the correction to their omitted tallying of music in Tom & Jerry included "Hackle and Jeckle" and "The Little Rascals," and gave BMI credit for the music duration in those episodes attributable to BMI based on the cue sheets. Tr. 1212-1214, 1240-1242 (Boyle).

9. They say that ASCAP's corrections of BMI's Bozo tallying errors are wrong because the "major portion of the [Bozo] show is live action." BMI Prop. Find. at 67. They ignore the fact that the videotape of the show -- to whose content they stipulated, so as to avoid showing it -- demonstrates that the live action portion of the show, although of considerable total duration, has but one

(footnote continued from previous page)
for between 582.48 and 624.36 minutes of music during its composite week (depending on whether a cue sheet for an untimed "Night Tracks Power Play" program is included on a projected basis). BMI Exh. XR3. ASCAP's tape timings showed a Night Tracks music duration during the composite week of 593.95 minutes. Boyle Rebuttal at 7-8; Tr. 1190-1191. The similarity of these figures shows the accuracy of ASCAP's tape methodology.

performance in it, and that virtually all music duration in the Bozo show appears in the cartoons. Tr. 1046-1048.

10. They criticize ASCAP's "methodology" in correcting BMI's errors in tallying music duration on Tom & Jerry and Bozo, "because ASCAP's data depended on tape analysis." BMI Prop. Find. at 70. But BMI misrepresents the nature of the tape analysis: tape recordings were used only to identify the program segments of the shows (e.g., that Tom & Jerry included "Three Stooges" shorts, "Heckle and Jeckle" cartoons, and so on), and not to identify the music used in those segments or its duration.^{3/} Tr. 1182-1183, 1186 (Boyle). The music used in those program segments, and the duration of those uses, was identified and

^{3/} BMI says that "[c]artoon episodes in particular cannot be identified generally. Tr. 1215 (Boyle)." BMI Prop. Find. at 68. There is not one word on the transcript page they cite that supports their allegation. It is not difficult to identify which cartoon series is being carried from audio tapes, e.g., through use of dialogue ("I tawt I taw a puddy tat" tells you a "Tweety and Sylvester" cartoon is being shown), character names ("What's new, Heckle?" tells you a "Heckle and Jeckle" cartoon is being shown), or character voices (Elmer Fudd's distinctive "You cwazy wabbit" must be in a "Bugs Bunny" cartoon). What Dr. Boyle said at the cited page was that, if the specific cartoon within the cartoon series could not be identified (i.e., "Bugs Bunny" cartoon A vs. "Bugs Bunny" cartoon B), ASCAP followed BMI's average cue sheet methodology, exactly as BMI did when it could not identify a particular series episode (i.e., "Perry Mason" show A vs. "Perry Mason" show B). Tr. 1215. This is illustrative of BMI's frequent mis-citations of the record.

computed using exactly the same methodology as BMI used in its survey.^{4/} Tr. 1183 (Boyle).

11. BMI says that it made "no assumptions at all about the music density of programs," citing Dr. Black's testimony at Tr. 1084. BMI Prop. Find. at 69. But, again, BMI is citing the record for a "fact" which does not exist. Dr. Black was not then asked about the assumptions concerning music density that might have been implicit in BMI's methodology. Tr. 1084. In fact, no allegation was made that BMI deliberately made such an assumption; the fact is that its methodology implicitly made such an assumption, and that was an error.^{5/} Tr. 1194-1195 (Boyle).

12. In sum, BMI fails to deal with the single most important fact in these proceedings -- that when the errors and omissions in its durational survey are corrected, that "objective survey" (using BMI's term) yields an ASCAP share close or comparable to the two-thirds shares yielded by ASCAP's four approaches.

^{4/} BMI claims that the corrections to its errors and omissions should be rejected because of time pressures they felt in examining underlying documentation. BMI Prop. Find. at 68, n.20. There are two replies to this nonsense: (1) it was BMI's counsel, not ASCAP's, who delayed the rebuttal document exchange; and (2) both parties operated under the same time constraints.

^{5/} BMI also makes some strange and in large part unintelligible comments about ASCAP's use of Nielsen Data, discussed below.

III.

BMI'S CRITICISMS OF ASCAP'S
FOUR APPROACHES ARE UNFOUNDED

A. ASCAP's Four Approaches
Are Unbiased and Accurate

13. BMI attacks ASCAP's four approaches with a host of complaints, not one of which withstands scrutiny:

14. They say that the four approaches "do not form the basis for the payment of any royalties by ASCAP." BMI Prop. Find. at 39. They overlook the fact that the 53-station survey used performance information which formed the basis for ASCAP's distribution of 1987 license fees for performances on those 53 stations. Tr. 593-595 (Boyle).^{6/}

15. They say ASCAP's distribution system "is not designed to reflect the marketplace value of the ASCAP repertoire to music users." BMI Prop. Find. at 40. They ignore the fact that music users take the values of the distribution system into account when negotiating license fees. Tr. 1109 (Messinger).

^{6/} They say that the ASCAP local television distribution system factors in network performances. BMI Prop. Find. at 40, n.11. That is inaccurate, misleading and irrelevant. Some of the license fees ASCAP receives from network affiliates are derived from the sale of commercial "adjacencies" to network programs by the local stations, and these revenues are therefore attributable to network performances. No network performances were used in any of ASCAP's four approaches. Tr. 1341-1342 (Black).

16. BMI says that, for the WTBS music census, ASCAP "rotated a single cue sheet for each [WTBS] program." BMI Prop. Find. at 41. That is grossly misleading. The fact is that ASCAP rotated a different cue sheet for each series episode. Boyle Direct at 16-17; Tr. 613-615. Thus, if 200 Perry Mason episodes appeared in 1987, ASCAP used 200 "rotated" cue sheets in total, not just one as BMI implies.^{7/} Id.

17. BMI complains that ASCAP did not furnish certain information in document production, such as survey tapes. BMI Prop. Find. at 43-46. But the fact is that all relevant information was offered to BMI, which for its own reasons determined not to avail itself of the offer.^{8/}

^{7/} Indeed, in such a case, ASCAP would have used 200 cue sheets in its 53-station survey, whereas BMI's durational survey would have used only 13.

^{8/} If there is any area where BMI throws dust by the handful into the air, this is it. In discussions between counsel to work out prehearing document production, ASCAP offered BMI everything in its files and suggested that BMI's counsel come to ASCAP's offices to examine the documents. BMI declined the offer -- its counsel stating in a telephone conversation that such a trip and examination "would be a waste of time" -- and, by its own decision (which was expressed without any of the "reluctance" they now feign) limited the items they requested. See, letter of ASCAP counsel dated October 10, 1989; ASCAP Response to BMI Motion to Compel dated October 19, 1989, at 3, n.2. ASCAP complied fully with their requests. It was not ASCAP which said the cue sheets were too voluminous to produce, as BMI claims. BMI Prop. Find. at 44, n.14. Rather, BMI declined ASCAP's offer to make everything available for BMI's examination. For BMI now, and throughout these proceedings, to complain
(footnote continued)

18. BMI says that music users do not attribute different values to different types of music use. BMI Prop. Find. at 46. That is not so. Tr. 700-701 (Boyle); see Tr. 1336 (Black). Indeed, BMI evidently overlooks the license fee in its own PBS agreement for the years 1978-1982 (this agreement is a public record, as it was filed in the Copyright Office, introduced in evidence in the 1978 Noncommercial Broadcasting Rate Adjustment Proceeding, and is not confidential). See 1978 Noncommercial Broadcasting Rate Adjustment Proceeding, Public Broadcasting Copyright Project, Statement of Position, February 17, 1978, Exh. B-3. That agreement provides that, for 1978, BMI received an initial payment of \$250,000. Thereafter, BMI's fee was to be adjusted annually based on the proportion of its share of music performances on certain nationally-distributed public broadcasting programs. That adjustment computation was based on a "per composition" schedule which distinguished between different types of uses -- features, background, and so on -- and valued them differently.^{9/} Id., at Par. 5(b),

(footnote continued from previous page)
that ASCAP did not provide information which BMI itself did not ask for is reminiscent of the child who murders his parents and asks mercy of the court because he is an orphan.

^{9/} The values were: Feature: 1; Background: 1/4; Theme: 1/8.

App. C. SESAC had a very similar fee schedule in its agreement with PBS. Id., Exh. B-1, at Par. 6, App. A.

19. BMI claims that the ASCAP distribution system is biased in favor of ASCAP music. BMI Prop. Find. at 47. That is not true: as Dr. Boyle testified, ASCAP music predominates, in about the same degree, across all music performance types. Tr. 652-653. Thus, no matter what weighting system is used -- ASCAP's, BMI's, or some other -- or even if all performances are given equal weight, ASCAP's predominance holds.^{10/} Tr. 653, 663-664 (Boyle).

20. BMI claims that ASCAP's four approaches exclude "a significant amount of BMI music." BMI Prop. Find. at 49. They cite the omission of the CNN Headline News theme to support their claim. BMI Prop. Find. at 50. But the record shows that this music was excluded because it was directly licensed. Tr. 787-788 (Boyle); ASCAP Exh.

^{10/} BMI is also sloppy and inaccurate in its depiction of ASCAP's weighting system and its operation. For example, contrary to BMI's assertion, ASCAP's weighting rules do not put a cap on the amount which durational background music performances may earn. Cf. BMI Prop. Find. at 47 with ASCAP Exh. 3, p. 586 et seq. Contrary to their assertion, prior performance history does not affect durational background crediting. Cf. BMI Prop. Find. at 48 with ASCAP Exh. 3, p. 586 et seq. Contrary to their assertion, BMI background music was tracked prior to 1980 -- only a very limited sub-type of non-ASCAP background music was not tracked. Cf. BMI Prop. Find. at 48 with Tr. 1144-1147 (Messinger). The record is indisputable that ASCAP does track non-ASCAP music. Messinger Rebuttal at 4; Tr. 508; Boyle Direct at 5-6; Tr. 586.

38RX. They cite "lined-through" BMI background music on cue sheets to support their claim. BMI Prop. Find. at 50. But, to the extent this "lined-through" music (an artifact of the pre-1980 practice) may not have been tallied in the 53-station survey (the only approach in which it appeared), it would make a difference of at most 1.6%. ASCAP Exh. 41RX.

21. BMI says that the ASCAP approaches misappropriate BMI music, which they claim to be theirs because they are paying royalties for its performance.^{11/} BMI Prop. Find. at 51-52. There are two answers to their claim. First, the right to license the music in question may be disputed between ASCAP and BMI. Tr. 1294-1295 (Smith). Second, in many cases (such as in the Bernard Herrmann example), BMI may indeed be paying royalties, but it does not have the right to license the music. Tr. 773-776 (statement of ASCAP counsel in response to Tribunal inquiry). That BMI chooses to make such payments (perhaps to keep the writer affiliates content to stay at BMI) does not mean that there is a legal basis for their claim.^{12/}

^{11/} BMI says they cannot verify ASCAP's "split works" adjustment. BMI Prop. Find. at 51. That is because they never asked for documentation supporting it. See, e.g., letter of BMI counsel dated September 28, 1989.

^{12/} The explanation given by ASCAP's counsel, cited above, is confirmed by SBK Catalogue Partnership v. Orion Pictures Corp., 723 F. Supp. 1053, 1062 (D.N.J. 1989) ("Beneficial owner" of copyright, such as writer who transfers copyright
(footnote continued)

22. Incredibly, BMI continues to maintain that the Syndex Fund makes a difference in this proceeding, in the face of flatly contrary law, and flatly contradictory facts concerning the duplication of motion pictures on distant signals. Cf. BMI Prop. Find. at 52-53 with Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C. 2d 663 (1980); Report and Order, 3 F.C.C. Rcd. 5299 (1988); Tr. 1305-1306 (Smith) (F.C.C. filing by the TVX Broadcast Group).

23. BMI says that ASCAP's 53-station survey is in error because the survey credits music used in advertisements. BMI Prop. Find. at 53. But if no differentiation among musical performance types is to be made, as BMI would have it, then no type of music use should be excluded. Once BMI excludes one type of music use, it is making the very type of differentiation in value which it criticizes ASCAP for making (and, indeed, which BMI itself makes in its own distribution system).

24. BMI says the use of the Larson Data and Nielsen Data is not new and therefore not a "changed circumstance" in this proceeding. BMI Prop. Find. at 53-54. But, for the purposes of this proceeding, that use is a

(footnote continued from previous page)
to music publisher in exchange for stated royalties, "do[es] not have an independent right to use or license others to use the copyright.")

"changed circumstance," because neither was available or used in the last Phase II ASCAP-BMI dispute, in 1978.

Messinger Direct at 2; Tr. 468.

25. BMI says ASCAP's 53-station survey is "virtually identical" to the all-local television data ASCAP submitted in 1978. BMI Prop. Find. at 54. They are wrong -- the stations sampled in 1987 were the significant distant signals only, rather than the universe of all local stations sampled in 1978. Tr. 571 (Messinger). BMI evidently erroneously thinks that the similarity of result makes for a similarity of methodology. Cf. Tr. 640-641 (Boyle).

26. BMI says the sample of stations ASCAP used in its everyday distribution survey may be biased because ASCAP's local television survey sample frame is based on each station's ASCAP license fees. BMI Prop. Find. at 58. BMI is wrong -- as Dr. Boyle testified, even if this license fee factor is "factored out" of the 53-station survey, the results are virtually identical. Tr. 603, 800-801.

27. BMI says their own television survey "reviews" 6,000,000 hours of programming each year.^{13/} BMI Prop. Find. at 58. If it is so comprehensive, why did they choose not to use it? We suggest the answer is that given

^{13/} We note in passing that BMI uses the term "review" concerning their data analysis while using the term "survey" concerning ASCAP's data analysis. Is there a difference?

by Commissioners Garcia and James in their 1978 dissent:
BMI deliberately withheld the data from its own regular
survey because that data supports ASCAP's position:

. . . BMI has their own performance credit
survey they use for paying local television fees
collected to their members. Yet, this survey
was not introduced into evidence. We find
ourselves confronted by the question: why did
BMI commission a special survey when they
already had a survey? The inference drawn by us
as a result of their failure to introduce their
performance credit survey into evidence is that
it may be similar to the evidence introduced by
ASCAP, which shows a 68% ASCAP/32% BMI
relationship.

1978 Cable Royalty Distribution Determination, 45 Fed. Reg.
63026, 63043 (1980).

B. ASCAP's Use of Nielsen Audience Viewing Data
Was Proper and Follows All Prior Precedent

28. BMI argues, both in regard to ASCAP's four
approaches and to the correction of BMI's durational
methodology, that ASCAP has somehow "misused" the Nielsen
Data. BMI Prop. Find. at 56-58, 62, 66, 68-69, 70-71. As
best we can understand BMI's argument, it is that our use of
the Nielsen average audience per quarter hour, rather than
total audience accumulated for each program's (varying)
duration, was somehow improper. But, as Dr. Boyle explained
in the simplest terms, it is necessary to control for the
differing lengths of programs, or there will be a double
count: either average music credits per program quarter

hour must be weighted by total program audience, or total program music credits must be weighted by average audience per quarter hour. Boyle Direct at 21; Tr. 625, 1200, 1229-1231. In either case, mathematically, the results are the same.

29. BMI's allegation that this use of Nielsen Data is "unprecedented" is nonsense. BMI Prop. Find. at 68. This is how claimants and the Tribunal have always used Nielsen Data. 1979 Cable Royalty Distribution Proceeding, 47 Fed. Reg. 9,879, 9,880 (1982) ("The Nielsen survey's . . . purpose was to provide as accurate a measure as possible of the viewing of distant signal programming by cable households."); 1981 Cable Royalty Distribution Proceeding, 49 Fed. Reg. 7,845, 7,846 (1984) (" . . . viewing provides a means of estimating the benefit to cable systems of particular distantly retransmitted programs."); 1983 Cable Royalty Distribution Proceeding, 51 Fed. Reg. 12,792, 12,794, 12,808-09 (1986). What is unprecedented and misleading is BMI's use of "Nielsen Data" as a stopwatch, rather than a measure of audience size. See, e.g., 47 Fed. Reg. 9,879 at 9,881, where the Tribunal distinguishes the time occupied by programming from the viewing of the programming.

IV.

IF ANY LICENSING MARKETPLACE ANALOGY
IS RELEVANT, IT IS THE COMPARATIVE
LOCAL TELEVISION LICENSE RATES,
WHICH FORM A FLOOR FOR ASCAP'S AWARD

A. The Distribution Marketplace is Relevant Here

30. BMI argues that the Tribunal should ignore the music industry's distribution marketplace, and instead focus solely on the analogy of the licensing marketplace -- and BMI's perception of the licensing marketplace at that. BMI Prop. Find. at 8-11. We have already dealt with this issue in our Proposed Findings, and so add only a few words in reply here:

31. BMI says that ASCAP justifies the use of performance data from the distribution marketplace because "ASCAP distributes its own revenues on the basis of this performance-based data." BMI Prop. Find. at 9. What BMI is noticeably silent on, however, is that BMI does exactly the same thing. ASCAP Exh. 24X. That is a compelling reason for using this data.

32. BMI cites to the decision in Cablevision Systems Development Co. v. MPAA, 836 F.2d 599 (D.C. Cir. 1988), to support its argument that the distribution marketplace should not be used. BMI Prop. Find. at 9. But that case involved the amount of compulsory license fees to be paid by cable operators -- a license rate question -- not

the allocation of those fees to claimants -- a distribution question.

33. Certainly, if no common distribution criteria exist among claimants, resort to the licensing marketplace may be proper and, indeed, necessary. But where common distribution criteria do exist in the marketplace -- as is the case here -- those criteria should serve as the Tribunal's marketplace surrogate. Messinger Rebuttal at 3-4; Tr. 1103-1104. And, the use of performance data is especially appropriate when distribution of fees already paid for past performances -- rather than projection of value into the future -- is at issue, as is the case here. Messinger Rebuttal at 4-5; Tr. 1105, 1129-1130.

B. Virtually All Licensing Analogies
BMI Presents are Irrelevant

34. BMI cites many different licensing "analogies." BMI Prop. Find. at 26-39. With the possible exception of local television rates, none are relevant. Our Proposed Findings have anticipated and dealt with most of BMI's arguments in this area, and so we limit our reply to these points:

35. BMI says that its relative position in total license fees has "grown significantly since 1978." BMI Prop. Find. at 27. That "significant" relative growth is

but 2.3%. Berenson direct at 6. The 1987 split is 59.5% ASCAP, 40.5% BMI. BMI Exh. B-1.

36. BMI cites local radio license rates. BMI Prop. Find. at 31. They are irrelevant because the Tribunal has determined the radio portion of Music's award to be "de minimis" and "unquantifiably small." 49 Fed. Reg. 20,051; 49 Fed. Reg. 28,019.

37. BMI cites television network license rates. BMI Prop. Find. at 31. They are irrelevant because network programming is not entitled to compensation under the compulsory license. 17 U.S.C. § 111(d)(3).

38. BMI cites pay cable license rates. BMI Prop. Find. at 31-32. They are irrelevant for several reasons: (1) Pay cable programming is not entitled to compensation under the compulsory license. 17 U.S.C. § 111(d)(3). (2) There is no evidence that pay cable programming and music mix is comparable to distant signal programming and music mix, and common sense tells us that it is not.^{14/} (3) The magistrate's Showtime decision, on which BMI places so much

^{14/} For some reason, BMI claims, in discussing pay cable rates, that "[f]oreign writers in many countries have recently won the right to specifically elect that their works be represented by BMI in the United States" BMI Prop. Find. at 34 (emphasis added). The fact is that such rights have existed since at least 1950. United States v. ASCAP, Civ. Action No. 42-245 (S.D.N.Y. March 14, 1950), at section IV(E).

reliance, is not final, as it is on appeal.^{15/} See, notice of appeal, United States v. ASCAP -- Application of Showtime/The Movie Channel, No. 90-6052 (2d Cir. January 8, 1990).

39. In fact, there is precedent in a prior Tribunal proceeding for the conclusion that the magistrate's Showtime decision must be disregarded. At the time of the hearings in the 1978 Noncommercial Broadcasting Rate Adjustment Proceeding, ASCAP (and BMI) had lost an antitrust challenge to the validity of the blanket license in the Second Circuit. CBS v. ASCAP, 562 F.2d 130 (2d Cir. 1977). The case was then on appeal to the Supreme Court. The public broadcasters asked the Tribunal to set a "per composition" fee, similar in concept to the "per use" fee which CBS was seeking in the antitrust litigation, and even specifically cited the Second Circuit's decision. 1978 Noncommercial Broadcasting Rate Adjustment Proceeding, Public Broadcasting Copyright Project Statement of Position, February 17, 1978, at 3-4, 9-12. The Tribunal wisely rejected the public broadcasters' argument, and the public

^{15/} The Turner decision, to which BMI refers, is also entirely dependent on the outcome of the appeal in Showtime. BMI cites the Showtime decision for the proposition that there are now 3 million works in the ASCAP repertory. BMI Prop. Find. at 34. Whatever the merit of that figure, it was derived from the trial record in CBS v. ASCAP, made in 1973. CBS v. ASCAP, 400 F. Supp. 737, 747 (S.D.N.Y. 1975); Tr. 1379-1380 (Bernson).

broadcasters subsequently withdrew it. Hearing of May 4, 1978 at 28, 30, 34; 43 Fed. Reg. 25,068, 25,069 (1978). The Supreme Court ultimately reversed the Second Circuit. BMI v. CBS, 441 U.S. 1 (1979).

40. Until the Showtime appeal is decided, we submit, the Tribunal should not consider the magistrate's decision at all. For, if the Tribunal did base its decision on the magistrate's opinion, and the Second Circuit reversed, we would then be without remedy to correct the error.^{16/}

41. BMI cites basic cable license rates, in particular those for the Nashville Network and Country Music Television. BMI Prop. Find. at 35. But these services are unrepresentative of the music use on distant signals. See Tr. 1382 (Berenson). Indeed, BMI's fees for these services resulted, at least in part, because of the greater use of BMI music on these particular services. Id.

42. BMI cites the 1978 jukebox agreement. BMI Prop. Find. at 35. This 10-year-old, nonprecedential

^{16/} The Tribunal also is neither bound by nor required to defer to the magistrate's decision. The Tribunal is here the equivalent of a trial court, and it is entitled to make its own judgments of the record as to findings of fact and conclusions of law, to the same degree the magistrate was, and independent of the magistrate's decision. Just as two district courts may disagree with each other, so too the Tribunal may disagree with the magistrate's erroneous decision.

agreement deals with musical performances in a medium as far removed as conceivable from the musical performances in distant signals. That it can be relevant here defies reason.

43. BMI cites PBS license rates. BMI Prop. Find. at 36. Or, rather, they do not cite them, for the BMI-PBS deal which covers 1987 is confidential. Tr. 878, 926 (Berenson). Therefore, they say, "no comparison with ASCAP's agreement could be introduced into the record." BMI Prop. Find. at 36. Of course, BMI does not want the Tribunal to consider the 1978 PBS rates, for the split there is ASCAP 83%, BMI 17% (\$1.25 million compared to \$0.25 million). 1978 Noncommercial Broadcasting Rate Adjustment Proceeding, 43 Fed. Reg. 25,069 (1978); Public Broadcasting Copyright Project Statement, supra, Exh. B-3. It is typical of BMI's inconsistency of reasoning that they urge the Tribunal to rely on the non-precedential 1978 jukebox deal, involving performances unrelated to distant signals, but studiously ignore the 1978 PBS rates, involving many of the very stations which are carried on distant signals.

44. BMI cites the 1987 Tribunal-determined rates for non-NPR noncommercial radio stations. BMI Prop. Find. at 36. They do so despite the Tribunal's decision and

direction that these rates are not to be so cited.^{17/} 1982 Noncommercial Broadcasting Rate Adjustment Proceeding, 47 Fed. Reg. 57,923, 57,925 (1982); Tr. 934-936 (Berenson).

C. The 1987 Local Television Rates Support ASCAP's Claim

45. If the licensing marketplace is to provide any analogy here, the only applicable 1987 license rate is that for the stations which are carried as distant signals -- the local television license rate.^{18/} But BMI's arguments concerning that rate distort the reality of the local television licensing marketplace. BMI Prop. Find. at 28-30, 38.

46. First, BMI maintains that it still is not getting its fair share in the local television marketplace. BMI Prop. Find. at 28-29. In 1978, BMI disclaimed the local television license agreement it had negotiated in 1972, arguing that it was an artifact of the past. Now, for 1987, it disclaims an agreement made in 1985, using the same argument. Id.; see ASCAP Exh. 17X. We suggest that Commissioners Garcia and James had the proper response in 1978: the marketplace is what it is, and the Tribunal

^{17/} It also defies reason that some \$6.6 million in cable license fees for 1987 should be distributed based on these stations' fees, which for BMI total but \$37,318 for 1987. Letter of Charles T. Duncan, Esq. dated January 12, 1990.

^{18/} The 1987 PBS rate would also be relevant, but BMI will not disclose it.

should not interpret a marketplace contract as to its equity or fairness:

[E]ach performing rights society negotiated to sell its repertory on the best terms and conditions possible at the time. The terms and conditions of each individual contract was the specific concern of that particular performing rights society. It must be assumed that each society knew the value of its repertory and that they conducted negotiations for terms and conditions in the contract based on that value.

The various terms and conditions in each contract regarding payment, duration of contract, audit adjustments, etc., were totally under the control and discretion of the parties to the contract. They were not forced to agree to any unacceptable terms. From the evidence, we find that these contracts were in full force and effect during the year 1978.

In our opinion, based on the Act and the legislative history, the Tribunal is without any authority to interpret an existing written contract as to value, equity or fairness.

45 Fed. Rep. 63,026, 63,042-43. See NBC v. CRT, 848 F.2d 1289, 1293-94 (D.C. Cir. 1988) (the Tribunal was correct to decline to engage in construction of private contracts).

47. Second, BMI argues for use of the "final" local television rate (58.9/41.1 in ASCAP's favor), which depends on the outcome of ASCAP's dealings with the broadcasters and therefore has not yet been paid, rather than the "interim" rate (59.5/40.5 in ASCAP's favor), which actually has been paid.^{19/} We have shown why the actual

^{19/} BMI touts the significance of its 1987 rate compared to
(footnote continued)

rate paid is appropriate. Messinger Rebuttal at 8-9; Tr. 1115-1116. But BMI again shows its inconsistency of argument: they would use the interim pay cable rates, but the final local television rate, because each better suits their purposes here.

48. Third, BMI stands the facts on their head regarding their package deal with the local television broadcasters. Cf. BMI Prop. Find. at 29-30 with Messinger Rebuttal at 9; ASCAP Exhs. 18X, 29R. BMI now contradicts everything in the record and says that a mechanism for court determination of reasonable license fees would be to its advantage!^{20/} How do they explain the report that the

(footnote continued from previous page)
its 1978 rate page 28 of its Proposed Findings (second full paragraph). On that same page, only one paragraph later, BMI downplays the significance of the 1987 rates, as "only incremental improvements" in the prior rates. BMI uses whatever "facts" suit the purposes of its case, even if they are inconsistent.

^{20/} BMI asserts that "[i]t is possible that BMI in fact may have agreed to accept a lower than market increase in its contractual [local television license] rate solely to obtain [the] benefit [of a rate court mechanism]. BMI Prop. Find. at 30 citing Tr. 1156 (Messinger cross-examination) (emphasis in original). BMI again mischaracterizes the record it cites: Ms. Messinger there testified that such a scenario "strains reason":

Q Is it possible that one of the things that BMI gave up was a higher fee than the one that it negotiated?

A I find that hard to believe.

(footnote continued)

chairman of the broadcasters' negotiating committee "was especially pleased with the rate court called for by the agreement"? ASCAP Exh. 29R. Why have cable program services had to sue BMI in an attempt to force them to accept such a mechanism? See complaints in NCTA v. BMI, No. 90-0209 (D.D.C. filed January 30, 1990); American Television and Comm. Corp. v. BMI, No. 90-0447 (C.D. Cal. filed January 29, 1990).

49. BMI cherry-picks the part of the local television package deal which it thinks helps its case (the license rate), turns history on its head regarding another part (the court fee determination mechanism), and completely ignores the other parts which cut against its claim (BMI's dismissal of its meritorious antitrust lawsuit and its agreement to allow its broadcaster owners to hold a special shareholders meeting).

50. For these reasons, if the local television rate has any probative value, it is as a floor for ASCAP's share, not as a ceiling.

(footnote continued from previous page)

Q My question was, is that a possibility?

A Mr. Duncan, anything is possible.

Q And since you don't know, that could very well have been the case, might it not have?

A It strains reason.

Tr. 1165.

V.

BMI'S PRESENTATION IS NOT CREDIBLE --
IT IS CARELESSLY PREPARED AND MISLEADING

51. There is one other element which the Tribunal should consider -- the credibility of the parties' presentations. In weighing the record and the issues, the Tribunal should examine the quality of the evidence and arguments presented: were they carelessly prepared or misleadingly presented? BMI's evidence and arguments do not stand that test, as a partial listing shows:

- BMI's claim to "license" 77% of 1987 gold records contrasts with the fact that 57% of the songs were in the ASCAP repertory;
- BMI's claim to use "the Nielsen Data" was misleading, for its "use" -- as a stopwatch rather than a measure of audience size -- was unlike any ever given credence in these proceedings;
- BMI's reference to the Tribunal's rates for non-NPR noncommercial radio stations was improper and directly contrary to the Tribunal's instructions which forbade such references;
- BMI's cue sheet tallying omitted enormous amounts of music, the overwhelming proportion of which was ASCAP music;

- BMI's claims as to the law and the facts regarding the Syndex Fund were dead wrong;
- BMI's citation to an excluded piece of evidence (BMI Prop. Find. at 17 n. 4, citing the Ryan book) violates the Tribunal's rules; BMI's own counsel agreed that it was not admitted into evidence and was identified, as an offer of proof, solely for purposes of preserving the question of its admissibility on appeal. Tr. 1168-69.

The quality of BMI's evidence and arguments is sorely lacking.


VI.

CONCLUSION

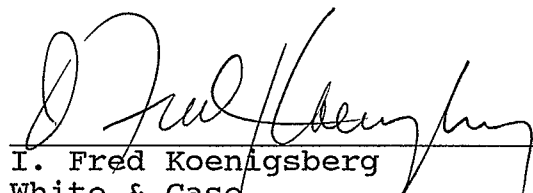
52. ASCAP is entitled to 67% of Music's Phase I Award.

Respectfully submitted,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS


Bernard Korman
ASCAP
One Lincoln Plaza
New York, NY 10023
(212) 870-7510

Of counsel: Bennett M. Lincoff



I. Fred Koenigsberg
White & Case
1155 Avenue of the Americas
New York, NY 10036-2787
(212) 819-8806

Dated: February 16, 1990

APPENDIX A

Note: Page 1 is a duplication of ASCAP Exhibit 34R, with data for Night Tracks revised only to comport with BMI's Night Tracks cue sheets as set forth in BMI Exh. XR3 and Tr. 1219 (Boyle).

Pages 3-5 are duplications of ASCAP Exhibit 35R, with data for WTBS TV revised only to comport with BMI's Night Tracks cue sheets as set forth in BMI Exh. XR3 and Tr. 1219 (Boyle).

CORRECTION OF BMI ERRORS IN ITS CUE SHEET ANALYSIS:
Night Tracks Music Duration Computed Per BMI Cue Sheets

<u>Station and Program</u>	<u>BMI Music</u>	<u>Other Music</u>
WTBS FILM	226.34	910.98
WTBS TV	461.91	379.40
Tom & Jerry	37.28	319.05
Night Tracks	255.40*	338.55*
CORRECTED WTBS TV	<u>754.59*</u>	<u>1,037.00*</u>
WSBK FILM	71.35	297.07
WSBK TV	1,301.30	1,025.25
:20 Minute Workout	(18.42)	13.50
Saber Riders and		
the Star Sheriff	0.04	39.46
Three Stooges	0.00	5.73
CORRECTED WSBK TV	<u>1,282.92</u>	<u>1,083.94</u>
WPIX FILM	127.58	480.84
WPIX TV	1,122.45	728.78
GI Joe	(24.50)	24.50
Transformers	(91.50)	94.25
Tom & Jerry	.63	17.92
CORRECTED WPIX TV	<u>1,007.08</u>	<u>865.45</u>
WWOR FILM	167.70	329.15
WWOR TV	1,027.52	814.53
Laurel and Hardy	(4.28)	31.91
Superman	1.43	19.53
CORRECTED WWOR TV	<u>1,024.67</u>	<u>865.97</u>
WGN FILM	586.35	604.85
Lilies of the Field	(5.52)	5.52
CORRECTED WGN FILM	<u>580.83</u>	<u>610.37</u>
WGN TV	685.27	638.32
Bozo	38.29	110.33
GI Joe	(9.80)	9.80
Transformers	(73.20)	75.40
CORRECTED WGN TV	<u>640.56</u>	<u>833.85</u>
CORRECTED WRST FILM	236.87	429.36
CORRECTED WRST TV	988.81	912.30

* These are the only figures changed from ASCAP Exh. 34R.

Source: ASCAP Exh. 34R; BMI Exh. XR3; Tr. 1219 (Boyle)

BMI EXHS. NOS. B-8, B-9, B-10 CORRECTED FOR UNTALLIED MUSIC
PERFORMANCES ONLY
Night Tracks Music Duration Computed Per BMI Cue Sheets

<u>Station</u>	<u>BMI Dur.*</u> (1)	<u>Nielsen**</u> (2)	<u>Wtd. BMI</u> (3)=(1)X(2)	<u>Larson***</u> (4)	<u>BMI %</u> (5)=(3)X(4)
WTBS FILM	19.9	.409	8.1		
WTBS TV	42.1	.591	<u>24.9</u>		
WTBS TOTAL			33.0	.387	12.8
WSBK FILM	19.4	.191	3.7		
WSBK TV	54.2	.809	<u>43.8</u>		
WSBK TOTAL			47.5	.031	1.5
WPIX FILM	21.0	.251	5.3		
WPIX TV	53.8	.749	<u>40.3</u>		
WPIX TOTAL			45.6	.037	1.7
WWOR FILM	33.8	.196	6.6		
WWOR TV	54.2	.804	<u>43.6</u>		
WWOR TOTAL			50.2	.144	7.2
WGN FILM	48.8	.257	12.5		
WGN TV	43.4	.743	<u>32.2</u>		
WGN TOTAL			44.7	.183	8.2
WRST FILM	35.6	.204	7.3		
WRST TV	52.0	.796	<u>41.4</u>		
WRST TOTAL			48.7	.216	<u>10.5</u>
TOTAL					41.9

Shares adjusted for 3.0% non-ASCAP and non-BMI music duration:

ASCAP Share: 57%
BMI Share: 43%

*Source: App. A, p. 1

**Source: BMI Exh. B-9

***Source: BMI Exh. B-10

BMI EXHIBITS NO. B-8, B-9, B-10
CORRECTED
Night Tracks Music Duration
Computed Per BMI Cue Sheets

<u>Station</u>	<u>Music Duration*</u>		Nielsen HH Viewing per <u>Quarter Hr.**</u>
	<u>BMI</u> (1)	<u>Other</u> (2)	
WTBS FILM	226.34	910.98	121,591
WTBS TV	754.59	1,037.00	95,196
WSBK FILM	71.35	297.07	7,007
WSBK TV	1,282.92	1,083.94	3,252
WPIX FILM	127.58	480.84	11,203
WPIX TV	1,007.08	865.45	6,582
WWOR FILM	167.70	329.15	25,645
WWOR TV	1,024.67	865.97	23,781
WGN FILM	580.83	610.37	58,900
WGN TV	640.56	833.85	38,714
WRST FILM	236.87	429.36	1,351
WRST TV	988.81	912.30	1,080

* Source: App. A., page 1.

**Source: ASCAP Exh. 35R.

BMI EXHIBITS NO. B-8, B-9, B-10
CORRECTED
Night Tracks Music Duration
Computed Per BMI Cue Sheets

<u>Station</u>	Music Duration Weighted by Nielsen Viewing	
	BMI	Other
	(4)=(1)x(3)	(5)=(2)x(3)
WTBS FILM	27,520,907	110,766,969
WTBS TV	<u>71,833,950</u>	<u>98,718,252</u>
WTBS TOTAL	99,354,857	209,485,221
WSBK FILM	499,949	2,081,569
WSBK TV	<u>4,172,056</u>	<u>3,524,973</u>
WSBK TOTAL	4,672,005	5,606,542
WPIX FILM	1,429,279	5,386,851
WPIX TV	<u>6,628,601</u>	<u>5,696,392</u>
WPIX TOTAL	8,057,880	11,083,243
WWOR FILM	4,300,667	8,441,052
WWOR TV	<u>24,367,677</u>	<u>20,593,633</u>
WWOR TOTAL	28,668,344	29,034,685
WGN FILM	34,210,887	35,950,793
WGN TV	<u>24,798,640</u>	<u>32,281,669</u>
WGN TOTAL	59,009,527	68,232,462
WRST FILM	320,011	580,065
WRST TV	<u>1,067,915</u>	<u>985,284</u>
WRST TOTAL	1,387,926	1,565,349

BMI EXHIBITS NO. B-8, B-9, B-10
CORRECTED
Night Tracks Music Duration
Computed Per BMI Cue Sheets

<u>Station</u>	Larson Weight*	Film & Series Music Duration Weighted By Nielsen Viewing & Larson Data		
		BMI	Other	Total
	(6)	(7)=(4)x(6)	(8)=(5)x(6)	(9)=(7)+(8)
WTBS	0.387	38,450,330	81,070,781	119,521,111
WSBK	0.031	144,832	173,803	318,635
WPIX	0.037	298,142	410,080	708,222
WWOR	0.144	4,128,242	4,180,995	8,309,237
WGN	0.183	10,798,743	12,486,541	23,285,284
WRST	0.216	<u>299,792</u>	<u>338,115</u>	<u>637,907</u>
Total		54,120,081	98,660,315	152,780,396
Share		35.4%	64.6%	100.0%

Shares Adjusted for 3.0% non-ASCAP and non-BMI music duration:

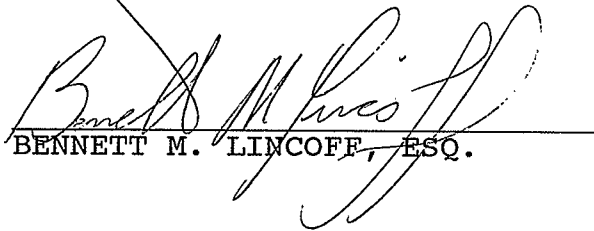
ASCAP share	64%
BMI share	36%

Source: BMI Exh. B-10.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing
Reply Findings of Fact and Conclusions of Law of the
American Society of Composers, Authors and Publishers were
served on February 16, 1990 by hand delivery on the
following:

Charles T. Duncan, Esq.
Michael W. Faber, Esq.
Reid & Priest
1111 19th Street, N.W.
Washington, D.C. 20036


BENNETT M. LINCOFF, ESQ.